No. 15685

In the United States Court of Appeals for the Ninth Circuit

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF GEORGE WILLIAM GRAHAM, DECEASED, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

Appellant brought this action against the United States under the provisions of the Federal Tort Claims Act[1] in the United States District Court for the District of Oregon (R. 1-10). The jurisdiction of the District Court was invoked under 28 U.S.C. 1346(b), *infra,* p. 35 (R. 1). On May 9, 1957, the District Court entered judgment for the United States (R. 62-63). On May 17, 1957, appellant filed a motion to amend findings of fact and objections to conclusions of law, under Rule 52(b) of the Federal Rules of Civil Procedure (R. 63-67). On May 27, 1957, the District Court entered an

[1] 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680.

order denying the motion and objections (R. 68). On July 23, 1957, notice of appeal was filed (R. 69). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.[2]

STATEMENT OF THE CASE

This action arose out of the death of George William Graham while engaged as a carpenter foreman in the performance of a contract entered into between his employer and the United States.

1. *The Undisputed Facts.*[3] On June 23, 1954, Robert C. Larson, doing business as the Larson Construction Company, entered into a contract with the Corps of Engineers of the United States Army for the construction and repair of portions of the Bonneville Dam project, a government-owned and controlled facility located on the Columbia River (R. 50-51). Included in this facility are a powerhouse, located between the Oregon shore of the river and Bradford Island, and a spillway dam, located between the island and the Washington shore of the river (R. 50). The dam contains 18 bays, numbered consecutively from the fishway bay on the Washington shore (Bay 1) to the fishway bay on Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which opens and closes in a vertical direction (R. 50). When closed, the gates rest on the top of the so-called "ogee" section (*i.e.,* the upper line of the submerged stationary portion of the dam) (R. 50).

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[2] The action was consolidated below with, and received the same disposition as, *Winton* v. *United States* and *Tobias* v. *United States.* The appeals in these latter actions (Nos. 15686 and 15687) have been stayed, pursuant to stipulation approved by this Court, pending the outcome of the appeal in this case.

[3] None of the basic facts, as found by the District Court, are challenged by appellant. Most of them were stipulated (R. 34-46).

The contract between Larson and the Corps of Engineers had specific reference to the construction of a cofferdam and the restoration of baffles on the south half of the spillway baffle deck (R. 51). The baffle deck is a concrete structure on the bed of the river, extending downstream across the width of the dam (R. 50). Concrete blocks, known as "baffles", are built into it for the purpose of dissipating the energy of the water discharged through the dam and reducing the downstream velocity thereof (R. 50-51). During the interval between the completion of the dam in 1938 and the execution of the contract, the baffle deck and baffles had become eroded by the flow of water (R. 51).

The contract contemplated that the construction of the cofferdam, which was incidental to the repair of the baffles (R. 149), would be undertaken by Larson without interruption of the normal power generation of the powerhouse (R. 51). It further contemplated that the construction work would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river had receded to a point where it could be handled entirely through the powerhouse (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On July 14, 1954, the Corps of Engineers gave notice to Larson to proceed with the performance of the contract, and the latter thereupon started the preliminary marshaling of necessary equipment and construction materials (which he was contractually obligated to furnish, along with all necessary labor) (R. 52). On August 13, 1954, Larson was notified that, in accord-

ance with the provisions of the contract, the construction work on the water was to be started within ten days (R. 52). On the same day, Larson conferred with Alfred M. Capps, the project superintendent in charge of the operation of the Bonneville dam, regarding the possibility of closing a number of the gates of the spillway dam during the preliminary construction work on the cofferdam (R. 52). As a result of this conference, the gates in Bays 11 though 17 were immediately closed (R. 52).

Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson and his acting superintendent, Harry Claterbos, with respect to their plans for carrying out the contract (R. 53). As project engineer, Leonti's duties included inspection of the project during the construction to ascertain that Larson was meeting the contract specifications, and to serve as liaison between Larson and the government employees responsible for the operation of the dam (R. 53). Leonti informed Larson that any requests to close additional gates of the spillway dam should be directed to him, and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib in Bay 9, which was to rest on the ogee curve and to run from the top of that curve at right angles to the face of the dam (R. 53). Because the contract drawing reflected the cross-section of the ogee as originally constructed, and because he thought it might subsequently have become eroded to some extent, Larson determined

that it was necessary to take soundings to establish its true cross-section at the time (R. 53-54). The contract itself neither required nor referred to the taking of such soundings (R. 54).

On August 18, Larson advised Leonti of his intention to take the soundings on August 20 (R. 54). Leonti was further advised that Larson proposed to accomplish this objective by pushing a barge into Bay 9, off the side of which the soundings would be taken (R. 54). Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 p.m. on August 20 in order to facilitate the operation (R. 54). At no time did Larson, or his representatives, request that any of the other open gates be closed (R. 54).

Leonti forwarded the request to the operations division of the dam, and it was fulfilled (R. 54). On August 19, Larson's superintendent, Claterbos, undertook a reconnaisance trip of the area in a tugboat for the purpose of ascertaining whether the proposed manner of taking the soundings was safe (R. 54-55). On the basis of this reconnaisance trip, and his own personal observation of the situation, Larson determined for himself that it was safe (R. 55). The advice of the Government on the matter was not sought (R. 55).

Shortly before 2:00 p.m. on August 20, Larson's tug MULEDUZER set out from the Bradford Island shore of the river, pushing Larson's barge FOREST No. 12 (R. 55). The barge was made fast to the tug by four steel lines (R. 56). Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug (R. 56). The other lines ran from the stern mooring bits of the barge to the stern winches of the tug (R. 56).

On board the tug or barge were six Larson employees: two crew members (Magnor Larson and Coles) and four members of the sounding party (Graham, Boylan, Tobias and Lewis) (R. 55). Tobias, a civil engineer, was in charge of the operation and none of the others in the sounding party had any control over the manner in which it was to be conducted (R. 55). All of the personnel involved, as well as all of the equipment utilized, had been selected by Larson alone (R. 55).

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and then proceeded upstream toward Bay 9 (R. 56). As the barge reached that Bay, it veered in a northerly direction and its port bow struck a pier located between Bays 8 and 9 (R. 56). As a result, the bow was stoved in and, as water came in through the hole, the barge moved in front of Bay 8 and the other open bays to the north (R. 56). Both the barge and tug swamped and sank; the former being broken to pieces (R. 56). All those aboard were thrown in the water and, with the exception of Coles, were killed.

2. *Proceedings Below.* On April 18, 1955, this suit was brought under the Tort Act to recover damages for Graham's death (R. 1-10). On December 3, 1956, a pretrial order was entered, which raised the issue as to whether appellant's remedy was under the Oregon Wrongful Death Act, O.R.S. 30.020, or the Oregon Employers' Liability Act, O.R.S. 654.325 (R. 19-33). Appellant contended that he was entitled to rely on the Employers' Liability Act, *infra,* pp. 36-39, notwithstanding the fact that the death of his decedent had occurred on navigable waters (R. 30). The Govern-

ment's position was that actions for damages for death of a workman on navigable waters within the territorial limits of the State of Oregon are governed by general maritime law; and that, as a consequence, only the Wrongful Death Act could be applied (R. 30-31).[4]

On March 29, 1957, Judge Solomon filed an opinion in which he ruled that the Employers' Liability Act was inapplicable for two separate and distinct reasons: (1) the Government was not responsible for the work being performed by Larson; and (2) the Act could not be constitutionally applied to this case (R. 47-48). Judge Solomon further determined that appellant had failed to prove that the Government was negligent in any respect and that, therefore, he was not entitled to recover under the Oregon Wrongful Death Act (R. 48).

On May 9, 1957, the District Court filed its findings of fact and conclusions of law (R. 48-62). In addition to the above-mentioned facts, the court found (R. 56-59) that (1) the proximate cause of the accident had been the turbulent condition of the water in the spillway basin; (2) this condition had been open, apparent and obvious to Larson, the tugboat operator and his other employees; (3) the difference in elevation of the water in the turbulent area opposite the open gates in the spillway basin, as compared with the area opposite the closed gates, also had been visible and obvious; (4) Larson had been an independent contractor and had not operated under the supervision, control and direction of the United States; (5) the Government had had no control over the details, manner or method by which the work under the contract was to

[4] The pretrial order reserved the question as to whether the Employers' Liability Act was inapplicable for some other reason (R. 32).

be accomplished, but had been interested only in insuring a general result in conformity with the contractual specifications and had retained a mere right to inspect the work during its progress in order to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner and means by which the sounding operation would be carried out, and no employee of the United States participated in the operation or gave Larson or any of his employees directions or orders with respect thereto; (7) no employees of the Government had been engaged in the sounding operation and there had been no intermingling of employees of the United States with the Larson employees in connection with the work being performed at the time of Graham's death; and (8) the Government had not been in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident. All of these findings are accepted by appellant on the appeal.

In its conclusions of law, the court reiterated its previous determination that the Employers' Liability Act was inapplicable and ruled that, since the United States was neither negligent itself nor chargeable with the negligence of Larson and his employees, liability under the Oregon Wrongful Death Act and the Federal Tort Claims Act had not been established (R. 60-61).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Oregon Employers' Liability Act could be constitutionally applied by an Oregon court.

2. Whether, apart from the constitutional obstacles to its application, the Oregon Employers' Liability Act extends to this case.

3. Whether the District Court's finding that there was no negligence on the part of Government employees is "clearly erroneous."

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Oregon Employers' Liability Act are set forth in the appendix to this brief, *infra,* pp. 35-39.

ARGUMENT

The District Court Correctly Determined that Appellant Had Not Established Liability on the Part of the United States

Introduction and Summary

28 U.S.C. 1346(b), *infra,* p. 35, confers jurisdiction upon the district courts over claims based upon the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 2674 provides that the assumed liability is only "in the same manner and to the same extent as a private individual under like circumstances." It is the position of the United States that the judgment of the court below is fully in accord with this statutory mandate; that, on the undisputed facts of this case, a "private individual under like circumstances" would not be liable to appellant.

In Points I and II we show that the court below correctly held that, for two separate and independent reasons, the Oregon Wrongful Death Act, and not the Oregon Employers' Liability Act, governs this action. In the first place, as Judge Solomon recognized, the

admiralty jurisdiction extends to an action bottomed, as this one, upon an alleged tort consummated on the navigable waters of the United States and occasioning the death of an individual whose presence on those waters had a maritime purpose. And, under a long line of decisions of the Supreme Court of the United States, liability for an alleged tort within the admiralty jurisdiction is determined by reference to general maritime law, rather than the law of the state within the territorial boundaries of which the navigable waters were encompassed. This is so irrespective of whether the suit is brought on the admiralty side of a federal court; on the civil side of a federal court exercising its diversity jurisdiction; or in a state court assuming jurisdiction under the "saving to suitors" clause of the Judiciary Act of 1789. Applying these principles, the federal courts have uniformly invoked maritime law in actions under the Tort Claims Act where the locality of the alleged tort was maritime.

While, under the maritime law there was no right of recovery for wrongful death caused by negligence, state wrongful death statutes which adopt the common law standard of care are given effect in admiralty and may serve as a foundation for an *in personam* suit to recover damages for a death occurring on navigable waters within the limits of the state. Thus, had this case arisen between private persons, an Oregon state court (or a federal court exercising its admiralty or diversity jurisdiction) could have looked to the Oregon Wrongful Death Act and the jurisprudence developed thereunder. In these circumstances, the same Act affords appellant's remedy here.

Insofar as the Oregon Employers' Liability Act is concerned, the Supreme Court of the United States has

consistently ruled that local statutes which work a material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international or interstate relations, may not be invoked in the disposition of claims based upon maritime torts. Since the Employers' Liability Act imposes a standard of care markedly different from the common law standard, accepted by the Wrongful Death Act and the maritime law alike, these rulings bar resort to it here. The Oregon Supreme Court itself has evidenced an understanding that the Employers' Liability Act cannot apply to torts which are maritime in character.

We further show in Point II that appellant would not be assisted even if there were no constitutional obstacles to the application of the Employers' Liability Act. In terms, as well as by reason of the construction given it by the Oregon Supreme Court, the Act cannot serve as a basis for imposing liability in circumstances where (1) the defendant was not in charge of, responsible for, or even engaged in the work performed by the decedent at the time of his death; and (2) the independent contractor who employed the decedent, in full charge of the work and the conditions under which it was being performed, affirmatively determined that those conditions posed no undue risk.

In Point III we show that there is no merit to appellant's attack on the finding of the District Court that the death of appellant's decedent was not the result of any violation by government employees of the reasonable care requirement of the common law. Far from being "clearly erroneous", that finding was compelled by the undisputed evidence—which reflects that the

negligence, if any, was that of the decedent's employer and the decedent himself. Under the provisions both of the Tort Act and Oregon law, the negligence of Larson is not chargeable to the United States.

I

The Oregon Employers' Liability Act Could Not Constitutionally Be Applied to This Case

A. *Appellant's Claim Is Grounded Upon An Alleged Maritime Tort*

It has long been established that "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth,* 3 Wall. 20, 36. See also *Leathers* v. *Blessing,* 105 U.S. 626; *Gonsalves* v. *Morse Dry Dock and Repair Co.,* 266 U.S. 171; *Swayne and Hoyt* v. *Barsch,* 226 Fed. 581 (C.A. 9); *Buren* v. *Southern Pacific Co.,* 50 F. 2d 407 (C.A. 9), certiorari denied, 284 U.S. 638; *Benedict on Admiralty,* 6th Ed., Section 127, and cases there cited. Otherwise stated, admiralty jurisdiction "has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred." *Wilson* v. *Transocean Air Lines,* 121 F. Supp. 85, 92 (N.D. Cal.) (characterized as an "excellent opinion" by this Court in *Higa* v. *Transocean Air Lines,* 230 F. 2d 780, 784, certiorari dismissed, 352 U.S. 802). And, in the application of this "locality" test, the critical inquiry always has been not "where the wrongful act or omission had its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." *Ibid.* See also *The Plymouth, supra; Atlee*

v. *Packet Co.,* 21 Wall. 389; *Smith* v. *Lampe,* 64 F. 2d 201 (C.A. 6), certiorari denied, 289 U.S. 751; *Benedict, supra,* Section 128 and cases there cited.[5]

Giving effect to this "locality test", it is clear that the purported tort here comes within the admiralty jurisdiction. Irrespective of where the negligent acts or omissions alleged in the complaint may have taken place, the fact remains that the death of appellant's decedent (*i.e.,* the consummation of the alleged tort) concededly occurred on the navigable waters of the United States.

While the "locality test" is the sole basis for determining whether an alleged tort is maritime in nature, it might be noted at this juncture that the presence of the decedent on the Columbia River had a special relation to commerce and navigation, and thus was not a matter of mere "local concern".[6] The sounding operation in which decedent was engaged at the time of his fatal injury was being conducted in the furtherance of the construction of the cofferdam contemplated by the contract between his employer and the Corps of Engineers. This construction, in turn, was incidental to the principal contractual undertaking: the restoration of the baffles on the spillway baffle deck of the Bonneville Dam (R. 149).

The Bonneville Dam project was recognized as an aid to navigation by the Oregon Supreme Court in *Atkinson* v. *State Tax Commission,* 156 Or. 461, 463, 62 P. 2d

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[5] In *Smith* v. *Lampe,* for example, admiralty jurisdiction was sustained in circumstances where a barge stranded on the shore of Lake Erie, allegedly as the result of the negligent signaling by defendant with the horn of his automobile during a fog.

[6] The relevance of this consideration will be seen at a subsequent point. See n. 10, *infra,* p. 20.

13, 67 P. 2d 161, affirmed, 303 U.S. 20. In any event, its status as such is manifest from Section 1 of the Act of August 20, 1937, c. 720, 50 Stat. 731, 16 U.S.C. 832, which provides in relevant part:

> *For the purpose of improving navigation on the Columbia River,* and for other purposes incidental thereto, the dam, locks, power plant, and appurtenant works under construction on August 20, 1937, at Bonneville, Oregon and North Bonneville, Washington (called Bonneville project in this chapter), shall be completed, maintained and operated under the direction of the Secretary of War and the supervision of the Chief of Engineers, * * *. [Emphasis supplied.]

Cf. *Ashwander* v. *T.V.A.,* 297 U.S. 288, 328-330.[7]

Apart from this existence of a general relationship between the Bonneville project and the furtherance of commerce and navigation, the specific objective served by the baffles under repair was the reduction of the downstream velocity of the water which was discharged through the spillway dam (R. 50-51). To the extent to which the fulfillment of this objective had been impeded by baffle erosion, the restoration work necessarily was of immediate and direct benefit to maritime commerce.

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[7] Compare also *The Blackheath,* 195 U.S. 361 (claim grounded upon damage to beacon in navigable waters comes within the admiralty jurisdiction). *The Raithmoor,* 241 U.S. 166 (same holding with respect to incompleted beacon); *Doullut and Co.* v. *United States,* 268 U.S. 33 (same holding with respect to pile clusters driven into bottom of navigable river for the purpose of aiding navigation).

B. *Being At Variance With The Characteristic Features Of The Maritime Law, The Employers' Liability Act Cannot Be Invoked Where A Maritime Tort Is Involved.*

1. As the Supreme Court noted in *The Lottawanna,* 21 Wall. 558, 575, the declaration in Article III of the Constitution that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" had reference "to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Southern Pacific Co. v. *Jensen,* 244 U.S. 205, determined that the considerations detailed in *The Lottawanna* prohibit common law courts, in the exercise of jurisdiction over civil maritime causes under the "saving to suitors" clause of Section 9 of the Judiciary Act of 1789, 1 Stat. 76, 77, from invoking state statutes "which work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." On this basis, the Supreme Court invalidated in *Jensen* the application of a state workmen's compensation statute to an injury sustained by a longshoreman engaged in unloading a vessel at a wharf in navigable waters, observing that the statute attempted to give a remedy "of a character wholly unknown to the common law."

To the same effect are *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149; *Robins Dry Dock Co.* v. *Dahl,* 266 U.S. 449; *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U.S. 479; *Messel* v. *Foundation Co.,* 274 U.S. 427, 434; *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647; and *Pope and Talbot, Inc.* v. *Hawn,* 346 U.S. 406. In the *Hawn* case, for example, suit was brought on the civil side of a federal district court to recover damages for a personal injury sustained while the plaintiff was working on a ship in navigable waters. Jurisdiction was based upon diversity of citizenship. Rejecting the defendant's argument that Hawn's rights were governed by Pennsylvania law, the Supreme Court observed [346 at 409]:

> True Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features * * *." *Panama R. Co.* v. *Johnson,* 264 U.S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any

> substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them.

Also rejected was the defendant's reliance upon *Erie* v. *Tompkins,* 304 U.S. 64, as a basis for applying state law.

2. In *Western Fuel Co.* v. *Garcia,* 257 U.S. 233, 240, 242, the Supreme Court observed that, although "it is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law," where such death "results from a maritime tort committed on navigable waters, within a State whose statutes give a right of action on account of death by wrongful act the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." This is because "the subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, *when following the common law,* will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242 [Emphasis supplied].[8]

Since the Oregon Wrongful Death Act imposes nothing more than common law liability [*Thompson* v. *Union Fishermen's Co-op. Produce Co.,* 128 Or. 172,

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[8] When the death of a seaman is involved, the Jones Act [Section 333 of the Merchant Marine Act, 1920, 41 Stat. 1007, 46 U.S.C. 688] provides, of course, the exclusive remedy and supersedes all state statutes which might otherwise apply. *Lindgren* v. *United States,* 281 U.S. 38.

174, 273 Pac. 953], it thus may be constitutionally applied (in federal and state courts alike) in cases arising from deaths on navigable waters within that state. The Oregon Employers' Liability Act, is, however, an entirely different matter.

As the court below pointed out in *Sanderson* v. *Sause Bros. Ocean Towing Co.,* 114 F. Supp. 849 (D. Ore.), and as is stressed by appellant, the Employers' Liability Act represents a radical departure from the "reasonable care standard" which has long measured liability both at common law and under the maritime law [9] —requiring, as it does, the employer to use "every device, care and precaution which it is practicable to use for the protection and safety of life and limb." Indeed, the sharp distinction between the two statutes in this regard has been referred to by the Oregon Supreme Court. See *e.g., Fromme* v. *Lang & Co.,* 131 Or. 501, 504-505, 281 Pac. 120; *Hoffman* v. *Broadway Hazelwood,* 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814.

In *Robins Dry Dock Co.* v. *Dahl,* 266 U.S. 449, suit had been brought in a New York state court to recover damages for personal injuries sustained by the plaintiff while engaged in repair work on a vessel lying in navigable waters within New York. The complaint alleged that the plaintiff had fallen in the hold when a plank scaffold on which he was standing had broken. It further alleged that his employer had failed to furnish a safe place to work and a safe scaffold, as re-

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[9] See *e.g., Jacob* v. *New York City,* 315 U.S. 752; *The Joseph B. Thomas,* 86 Fed. 658 (C.A. 9); *Jeffries* v. *DeHart,* 102 Fed. 765 (C.A. 3).

quired by the New York Labor Law. In instructing the jury, the trial court noted that maritime law controlled the action, but went on to state that, in determining whether there had been negligence, the duty imposed upon the defendant by the Labor Law could be taken into consideration. Reversing the resulting judgment in the plaintiff's favor, the Supreme Court stated [266 U.S. at 457]:

> The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant-Smith Porter Ship Co.* v. *Rhode,* 257 U.S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U.S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis* v. *Luchenbach S. S. Co.,* 247 U.S. 372, 382; *Union Fish Co.* v. *Erickson,* 248 U.S. 308; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149; *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 259. They would not have been different if the accident had occurred at San Francisco.
>
> The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material. See *Central Vermont Ry. Co.* v. *White,* 238 U.S. 507, 511; *New Orleans & N.E.*

R.R. Co. v. *Harris,* 247 U.S. 367, 371; *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 21.[10]

See also, to the same effect, *Schuede* v. *Zenith S. S. Co.,* 216 Fed. 566 (N.D. Ohio) (Ohio Employers' Liability Act); *Payne* v. *Jackson Forwarding Co.,* 290 Fed. 936, 938 (C.A. 5) (Florida Hazardous Employment Act); *Young* v. *Clyde S. S. Co.,* 294 Fed. 549, 550-551 (S.D. Fla.) (same); *Turner* v. *Wilson Line,* 142 F. Supp. 264 (D. Mass.) (Massachusetts Death Statute, because of its punitive nature, is inconsistent with the "characteristic features of the general maritime law" and accordingly can not be invoked with respect to a maritime tort). And in *Hawkins* v. *Anderson & Crowe,* 84 Or. 94, 101, 164 Pac. 556, the Oregon Supreme Court stated with reference to the Employers' Liability Act itself:

> It may be that the rights of the parties are to be determined by the maritime law: Schuede v. Zenith S. S. Co. (D.C.), 216 Fed. 566. If so, the provisions of the Employers' Liability Law * * * are certainly not applicable.

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[10] As heretofore shown (pp. 13-14, *supra*), the presence of appellant's decedent on navigable waters at the time of his death had a "direct relation to navigation and commerce." Compare in this connection *Mark* v. *Portland Gravel Co.,* 130 Or. 11, 278 Pac. 986. There, the Oregon Workmen's Compensation Statute was held applicable to an injury sustained by the engineer of a dredge which was engaged in scooping sand from the bed of a navigable river. Resting its decision on the fact that the dredging operation was being conducted solely for the purpose of obtaining sand for commercial use, the court indicated its awareness that a different result would have been required had the purpose been to deepen the channel as an aid to navigation.

C. *The Principles Governing Actions Between Private Parties On Alleged Maritime Torts Apply Equally To Tort Act Suits.*

It follows from the foregoing that the court below was correct in its determination that the Oregon Employers' Liability Act can play no part in a Tort Claims Act suit grounded upon an alleged maritime tort. True enough, as appellant emphasizes, the Tort Act adopts the law of the place where the negligent act or omission took place. 28 U.S.C. 1346(b). Cf. *Eastern Airlines* v. *Union Trust Co.,* 221 F. 2d 62 (C.A.D.C.), certiorari denied, *sub nom. Union Trust Co.* v. *United States,* 350 U.S. 911. But all that means is that the court below was required to look to those principles which Oregon could and would have applied had the litigation been between private parties. As has been seen, in the circumstances of this case, the Oregon courts (as well as those of all other jurisdictions) would be required to measure a private defendant's liability by the standard of care prevailing under general maritime law (*i.e.,* the common law standard). In other words, no serious conflict of laws problem can arise in actions on maritime torts because of the constitutional mandate of uniformity.

All of the reported Tort Act cases involving maritime torts are in accord with this analysis. In *Somerset Seafood Co.* v. *United States,* 193 F. 2d 631 (C.A. 4), for example, suit was brought under the Act to recover damages for the loss of the plaintiff's vessel, which allegedly had sunk as the result of the negligent marking by the United States of a wreck located in navigable waters within the territorial limits of Vir-

ginia. On its determination that the loss had been proximately caused by negligence on the part of both the Government and the navigator of the vessel, the Fourth Circuit applied the divided damages rule peculiar to admiralty law. Referring, *inter alia,* to *Southern Pacific* v. *Jensen, supra,* the court reasoned that, with respect to torts within the admiralty and maritime jurisdiction, Virginia law of necessity adopts that rule.

In *Russell, Poling & Co.* v. *United States,* 140 F. Supp. 890 (S.D.N.Y.) the plaintiff sought to recover under the Tort Act for the stranding of their barge while under tow in navigable waters within New York. The Government filed a conditional third party complaint against the tug owner for contribution and the latter moved for judgment on the pleadings; asserting that New York law applied and that under that law there is no right of contribution between joint tort feasors. Denying the motion, the court stated [140 F. Supp. at 892]:

> It is true that the plaintiffs' claim against the United States of America under the Federal Tort Claims Act is to be determined "in accordance with the law of the place where the act or omission occurred." However, the claim here asserted by the plaintiffs for damages to the barge through stranding is a maritime tort. The third party claim—that of fault of Connors while it was towing the barge in the channel—likewise is a maritime claim. Since the claims asserted are maritime torts, substantive admiralty principles would be applied by the New York courts and this would include the right of contribution where admiralty

permits it between joint tort feasors [Citing *inter alia, Hawn* v. *Pope & Talbot, Inc., supra*].

See also *State Road Department* v. *United States,* 78 F. Supp. 278, 280 (N.D. Fla.); *Moran* v. *United States,* 102 F. Supp. 275, 278-279 (D. Conn.).

Dye v. *United States,* 210 F. 2d 123 (C.A. 6), cited by appellant, is hardly to the contrary. The question as to whether Kentucky law inconsistent with the general maritime law could be applied was not even mentioned, let alone decided. Indeed, that question was not before the court since the plaintiff there relied entirely on an alleged violation of the common law standard of care, which is accepted by Kentucky and maritime law alike.

II

Even Were There No Constitutional Obstacle to Its Application, the Employers' Liability Act Would Not Govern Here

Even if there were no constitutional prohibition against the application of the Oregon Employers' Liability Act in the circumstances of this case, appellant's position would not be improved. By its terms, and as construed by the Oregon Supreme Court, the coverage of the act in no event would extend to the situation at bar.

1. The repair and construction work called for by the contract was entirely under the supervision, control and direction of Larson, the decedent's employer. Larson was not only under a duty to supply all necessary equipment and labor but, additionally, he had the sole voice with respect to "the details, manner, [and] method by which the work under the contract was to be accomplished" (R. 58). For its part the Government possessed the right merely to insure that the

"general result [was] in conformity with the contract's specifications" (R. 58).

As thus contemplated by the contract, the United States at no time assumed an active role in either the formulation or the execution of the sounding operation which lead to the death of appellant's decedent. At the outset, it was Larson that decided that soundings should be taken; the contract specifications neither required nor referred to such a course of action in the project area (R. 54). Having made this decision, Larson then determined for himself both how the operation was to be conducted and that it involved no undue risk to the personnel involved (R. 54-55, 58). Specifically, Larson (1) determined that the soundings would be taken in Bay 9 off the side of a barge; (2) concluded that only the gates in Bays 9 and 10 need be closed for this purpose; and (3) dispatched his superintendent on a reconnaissance mission to insure that the operation, as planned, could be safely conducted (R. 54-55). Larson did not seek the Government's opinion as to the safety of the operation; to the contrary, the construction project engineer's participation was limited to receiving, and forwarding to the operating personnel of the dam, the Larson request that the gates in Bays 9 and 10 be closed (R. 54-55). That request was honored (R. 54).

Insofar as the execution of the operation was concerned, Larson selected the tug and barge to be utilized (R. 55, 58). He also selected the captain and other members of the tug's crew, as well as the personnel comprising the sounding party (which was in charge of a civil engineer in Larson's employ) (R. 55, 58-59). And Larson, or his representative, directed the method by which the tug and barge were to be fastened together

and formulated the route that the unit was to take in reaching the situs of the proposed soundings (R. 55-56, 58).

2. The keystone of the Employers' Liability Act is O.R.S. 654.305, *infra,* p. 36, which provides in relevant part:

> Generally, all owners, contractors of subcontractors and other persons *having charge of, or responsible for, any work* involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb * * *. [Emphasis supplied.]

And O.R.S. 654.310, *infra,* p. 36, dealing with the protective measures to be observed regarding dangerous machines, equipment and devices, begins with:

> All owners, contractors, subcontractors or persons whatsoever, *engaged* in the construction, repairing, alteration, removal or painting of any building * * *. [Emphasis supplied.]

On its face, then, the statute imposes a special duty only upon those who, unlike the Government here, are actually engaged in the work which subjects the employees to danger, or are in charge of it.

In *Warner* v. *Synnes,* 114 Or. 451, 230 Pac. 362, 235 Pac. 305, the defendant lumber company had retained the plaintiff's employer, Synnes, as an independent contractor to do repair, alteration and construction work on the lumber company's premises. As is true of the Government here (R. 58), the lumber company did not exercise control over the work of the independent contractor but, rather, was interested only in the result. The

company did, however, furnish certain equipment to Synnes, including a rope which was used by the latter on a scaffold. Injured when the rope broke, the plaintiff brought suit against the lumber company under the Employers' Liability Act; the complaint alleging that the company (1) had failed to provide a safe place to work; (2) had allowed an unsuitable rope to be used in the construction of the scaffold; and (3) had failed to test the material which it had furnished to the contractor.

In reversing a jury verdict in favor of the plaintiff, the Oregon Supreme Court observed [114 Or. at 458]:

> *It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work.* . . . The reason for making the contractor alone responsible and exonerating the owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of. [Emphasis supplied.]

The Court added that [114 Or. at 458]:

> The mere retention by the owner of the right to inspect as it progressed for the purpose of determining whether it was completed according to plans and specifications does not operate to create the relationship of master and servant between the owner and those engaged on such work.

Cf. *Lawton* v. *Morgan, Fliedner and Boyce,* 66 Or. 292, 131 Pac. 314, 134 Pac. 1037; *Tamm* v. *Savset,* 67 Or. 292, 135 Pac. 868.

3. Notwithstanding *Warner* v. *Synnes, supra,* appellant argues that it is totally irrelevant that the Government was not engaged in, in charge of or responsible for the sounding expedition. His theory seemingly is that it is sufficient that employees of the United States operated the spillway dam and its gates.

A sufficient answer is that this line of argument totally ignores the fact that Larson's control over the manner in which the expedition was to be conducted extended to the matter of the number of dam gates that were to remain open while the soundings were taken (and, therefore, the amount of water which was being discharged). The determination that only the gates in Bays 9 and 10 would be closed was made by Larson on the basis of his superintendent's reconnaisance trip and his own knowledge (not shared by the Government) of the intimate details of the operation and the precise nature of the equipment which was to be utilized. And, appellant himself places considerable emphasis on the evidence that, had Larson requested that an additional gate be closed, that request undoubtedly would have been honored.

Appellant can point to no Oregon decision under the Act in which an owner was held liable to an employee of an independent contractor in circumstances where the contractor possessed anything approaching Larson's degree of responsibility and control over every detail of the sounding operation and the conditions under which it was being carried out. Even a cursory examination of the cases upon which he relies

will reflect their marked difference from the facts of this case.

In both *Rorvik* v. *Northern Pacific Lumber Co.,* 99 Or. 58, 190 Pac. 331, 195 Pac. 163, and *Pacific States Lumber Co.* v. *Bargar,* 10 F. 2d 335 (C.A. 9), for example, the statute was held applicable because the plaintiff's employer and the defendant were actively engaged in a common pursuit and there was an intermingling of the two sets of employees. Cf. *Drefs* v. *Holman Transfer Co.,* 130 Or. 452, 280 505. And, in *Walter* v. *Dock Commission,* 126 Or. 487, 266 Pac. 634, 270 Pac. 778, the accident occurred by reason of an affirmative act of the defendant in the course of its work (*i.e.,* the ejection of the railroad car). This act was done without even the knowledge of any individual engaged in the work being performed by the decedent. Further, decedent's employer was not an independent contractor of the defendant and, unlike Larson, possessed no control whatsoever over the manner in which the railroad equipment was handled. Again, the only affirmative action taken by Government employees which in any way affected appellant's decedent was the closing of those gates which the persons engaged in, responsible for and in charge of the sounding operation deemed necessary for the safety of decedent and the other personnel involved.

4. While it was not necessary for the District Court to reach the question, it is worthy of note that the record does not support appellant's contention that there was a violation by the Government of the standard of care prescribed by the Employers' Liability Act. Appellant asserts (Br. p. 26) that the Act imposed a duty upon the United States either (1) to close additional gates, or (2) to warn Larson as to the alleged

"dangerous condition created by the turbulent waters in the immediate vicinity of [Bay 9]". But, as the court below found "[t]he turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tug boat and the other employees of the independent contractor" (R. 57). The court additionally found that "[t]he difference in the elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious" (R. 57).

In view of these findings, coupled with the trip made by the Larson superintendent for the sole purpose of determining whether the soundings could be taken safely, no duty to warn could possibly have arisen, under the Act or otherwise (cf. p. 32, *infra*). Larson's information as to the turbulent nature of the waters, and the significance thereof in terms of the safe conduct of the sounding operation, was superior to that of the Government.

III

The District Court's Finding that There Was No Negligence on the Part of Government Employees Is Not "Clearly Erroneous"

The District Court's conclusion that appellant had not established liability under the Oregon Wrongful Death Act was grounded upon its ultimate finding that "[n]either the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing the death of [appellant's decedent]" (R. 59). Challenging this critical finding, appellant insists that whether the Government was negligent or not is a question of law, and not of fact.

But, as this Court observed in the very case upon which appellant relies in making this assertion [*United States* v. *Marshall,* 230 F. 2d 183, 187]:

> Negligence is ordinarily a question of fact to be resolved by the trier of fact (citing cases). It is only where the facts are undisputed *and* where but one reasonable conclusion can be drawn therefrom that negligence becomes a question of law (citing cases). If the finding of [no] negligence is supported by substantial evidence considered in the light most favorable to the prevailing party, then it should be sustained. [Emphasis in original.]

Cf. *Brady* v. *Oregon Lumber Co.*, 117 Or. 188, 243, Pac. 96; *Allison* v. *Davidson,* 173 Or. 244, 141 P. 2d 530; *Jackson* v. *Sumter Valley Ry. Co.*, 50 Or. 455, 93 Pac. 356.[11]

Measured by this standard, which is in essence the "clearly erroneous" test provided by Rule 52(a) of the Federal Rules of Civil Procedure, the findings below are invulnerable to attack. The record reflects that, if there was negligence at all, it was on the part of Larson—who (1) had total direction of the work in which appellant was engaged (including the manner in which, and the conditions under which, it was to be performed); and (2) had made the decision that the dictates of safety required the closing of no further gates.

That the United States cannot be held for the negligence, if any, of Larson is not open to question. Apart from the general rule that an employer is not responsi-

[11] The cited Oregon cases are to the same effect. In any event, as this Court very recently re-emphasized, the federal courts are not bound by the scope of review pertaining in state courts. *Grenier* v. *Harley,* 250 F. 2d 539, 542.

ble for the negligence of its independent contractors,[12] the Congressional definition of "employee of the Government" for the purposes of Section 1346(b) expressly excludes officers, employees or persons acting on behalf of contractors with the United States. Cf. *United States* v. *Hull,* 195 F. 2d 64, 66 (C.A. 1); *Strangi* v. *United States,* 211 F. 2d 305 (C.A. 5); *State of Maryland for Use of Pumphrey* v. *Manor Real Estate and Trust Co.,* 176 F. 2d 414 (C.A. 4).[13]

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[12]*Restatement of the Law of Agency,* § 250.

[13]As part of its general discussion of the waiver of the Government's immunity from suit in tort, the First Circuit observed in *United States* v. *Hull, supra,* 195 F. 2d at 67:

> [T]here are certain cases where under local law a private person may be liable for injuries resulting from the negligence of a carefully selected independent contractor. Restatement of Torts § 416 *et seq.* Presumably the United States would not be subject to liability in such a case under the Federal Tort Claims Act, for it may well be that the negligent independent contractor would not be deemed an "employee" of the government within the meaning of Section 1346(b).

In Oregon an employer is liable for the negligence of an independent contractor only in circumstances where the work being performed is necessarily attended with danger, however skillfully performed. If the work to be performed by the independent contractor may be safely done in the exercise of reasonable care (though in the absence of such care injurious consequences may result) then the contractor alone is liable. *Persons* v. *Raven,* 187 Or. 1, 207 P. 2d 1051; *Winneford* v. *MacLoad,* 68 Or. 301, 136 Pac. 25; *Dibert* v. *Gubisch,* 74 Or. 64, 144 Pac. 1184; *Oregon Fisheries Co.* v. *Elmore Packing Co.,* 69 Or. 340, 138 Pac. 862. Since, in the *Dibert* and *Winneford* cases, the court held that blasting operations utilizing high explosives were *not* "necessarily attended with danger" so as to render the employer of the contractor liable, appellant cannot be heard to assert that this case comes within the narrow exception to the general rule of nonliability.

That the admiralty law does not impose liability upon an employer of an independent contractor for the latter's negligence is also clear. See *e.g., Bettis* v. *Frederick Leyland & Co.,* 153 Fed. 571 (C.A. 5); *Navigazione Alta Italia* v. *Vale,* 221 Fed. 413 (C.A. 5); *The Clan Graham,* 163 Fed. 961 (D. Ore.).

Appellant's reliance on Section 343 of the *Restatement of the Law of Torts,* for the proposition that the United States was under a common law duty to close additional spillway gates in the area of Bay 9, or to warn Larson of the dangers allegedly inherent in the turbulent condition of the water, is difficult to understand. That Section (which, as appellant correctly observes, represents Oregon law) provides that "[a] possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereof *if,* but only *if,* he * * * (b) has no reason to believe that they will discover the condition or realize the risk involved therein" [Emphasis supplied]. It cannot possibly be said that the Government had no reason to believe that Larson and his employees would discover the turbulent condition of the water when, as the court below found, that condition was "open, apparent, and obvious to all." And, in view of the reconnaisance trip undertaken by Larson's superintendent —in the very area in which the accident occurred and under similar conditions—appellant cannot seriously contend that the Government knew, or should have known, that Larson and his employees did not fully appreciate any dangers that may have been involved in the carrying out of the sounding operation. Surely, as implicitly recognized by the court below, the Government had every right to assume that the Larson superintendent was capable of ascertaining the degree of safety of the scheme conceived by Larson for the taking of soundings by his own employees. After all, his reconnaisance trip was made for that very purpose.

In these circumstances, we find it equally difficult to comprehend appellant's reliance upon *Dye* v. *United States,* 210 F. 2d 123 (C.A. 6). In that case, the evidence

reflected that the condition which occasioned the accident was difficult, if not impossible, to perceive at any distance, and that, as to the operators of small craft in the vicinity of the dam, it represented a latent hazard. Referring to the testimony adduced at trial, the Sixth Circuit pointed out that "the public never knows when it [the dam] is open or closed" (210 F. 2d at 127), and "at a point from 1000 to 2500 feet away from the dam, a person could not tell when the wickets were open by seeing merely the one sign on the Pennsylvania Railroad bridge" (*id.* at 127).

Nor is there anything in appellant's quotation from *Hicks* v. *Peninsula Lumber Co.,* 109 Or. 305, 220 Pac. 133, which detracts from the propriety of the findings below. In actuality, the *Hicks* case serves to bring into still sharper focus the lack of merit to appellant's attack upon them.

There, the plaintiff's employer, an independent contractor, had been retained to install a so-called mud-drum beneath boilers in the defendant's factory. The contract required the defendant, before the work commenced, to disconnect the pipe leading from the mud-drum to a "blow-off" tank located outside the building. The purpose of this requirement was to insure that live steam emitted from the tank did not back up the pipe into the mud-drum while the work was in progress.

The defendant disconnected the pipe. Subsequently, however, it was reconnected by the defendant without the knowledge of the plaintiff or any other employee of the contractor. Still later, while the plaintiff was working inside the drum, an employee of the defendant, without ascertaining whether the valves in the reconnected pipe were close, caused live steam to be ejected from a boiler. This steam passed throught the "blow-

off'' tank and backed up into the pipe leading to the mud-drum. Because the valves were open, the steam eventually reached the mud-drum and seriously scalded the plaintiff.

On these facts, the Oregon court held that the question of the defendant's negligence was for the trier of fact. In view of that holding, appellant cannot assert that the finding of the court below was ''clearly erroneous''; *i.e.,* that the Government was negligent as a matter of law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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MARCH, 1958.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

> Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2671.

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States,

and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The Oregon Employers' Liability Act provides as follows:

654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or oper-

ation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to

come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for

their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

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